2006

State of Utah v. John Angelo Garcia : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellant, vs. JOHN ANGELO GARCIA, Defendant/Appellee.	Case No. 20060328-CA

BRIEF OF APPELLANT

APPEAL FROM AN ORDER SUPPRESSING THE SEARCH OF A DUFFLE BAG CONTAINING 32 POUNDS OF MARIJUANA, AS WELL AS ADDITIONAL EVIDENCE RECOVERED PURSUANT TO A SEARCH WARRANT, IN THE THIRD JUDICIAL DISTRICT COURT IN SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK PRESIDING.

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IN THE UTAH UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appellant,** **vs.** **JOHN ANGELO GARCIA,** **Defendant/Appellee.**	**Case No. 20060328-CA**

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The State appeals from an order suppressing evidence seized pursuant to a search warrant, in the Third Judicial District Court in Salt Lake County, State of Utah, the Honorable J. Dennis Frederick presiding. This Court has jurisdiction to consider the petition pursuant to Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

Issue 1: Did the trial court err in concluding that defendant had standing to challenge the search of the duffle bag when the record does not support a legitimate expectation of privacy?

Issue 2: Did the trial court err in failing to determine whether the affidavit used to procure a warrant for the search of defendant's apartment was adequate to support probable cause even when the tainted evidence of 32 pounds of marijuana is redacted?

Standards of Review for Both Issues: A trial court's factual findings underlying a decision to grant or deny a motion to suppress evidence are reviewed for clear error. *State v. Duran*, 2005 UT App 409, ¶ 10, 131 P.3d 246. However, the trial court's conclusions of law, and its application of the law to the facts, are reviewed under correctness standard, according no deference to the trial court. *State v. Brake*, 2004 UT 95, ¶ 11, 103 P.3d 699 (Utah 2004).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are relevant to this appeal and reproduced in pertinent part:

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendant and his brother, Jeremiah Andrew Garcia, were charged by Information with two counts of unlawful possession of a controlled substance (psilocin and marijuana) with intent to distribute within 1000 feet of a school, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (West 2004); and one count of endangerment of a child, a third degree felony, in violation of Utah Code Ann. § 76-5-112.5 (West 2004). R. 1-2.

Following a preliminary hearing, defendant was bound over for trial. R. 108.

By minute order dated March 21, 2006, the court granted defendant's motion to suppress after concluding that the search of the duffle bag violated defendant's constitutional rights. R. 79; 90-91.

On March 31, 2006, the State filed a motion to dismiss the charges against defendant because suppression of the evidence in the duffle bag and other evidence recovered afterward pursuant to the search warrant had "substantially impaired the State's case . . ." R. 81.

The court granted the State's motion by order dated April 3, 2006. R. 82.

The State timely appealed. R. 93.

STATEMENT OF FACTS

The mysterious duffle bag

When Salt Lake City police officers confronted two suspects leaving the scene of a reported robbery, one thing became immediately apparent: They were reluctant to part with a large, nylon duffle bag. R. 74 (Affidavit for Search Warrant, dated October 12, 2005), Addendum A.[1] When officers challenged them, the two men fled back into the apartment they were exiting, hauling the duffle bag with them. *Id.* Moments later, officers again encountered one of the suspects climbing out onto a balcony attached to the apartment. *Id.* Once he was outside, someone inside handed out the duffle bag. *Id.* When officers again challenged the suspect, he ducked back inside, leaving the duffle bag on the balcony. *Id*

Officers returned to the front door of the apartment and knocked on the door. *Id.* Someone shouted back that everything was "OK." *Id.* Still, those inside refused to open the door. *Id.* The officers said they needed to come inside to investigate a possible robbery reported by a downstairs neighbor who told officers she had seen three males, one wearing a

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[1] The affidavit was also admitted into evidence as State's Exhibit 1 during a hearing on defendant's motion to suppress.

ski mask, running away from the apartment. *Id.* The officers told those inside that they would have to force the door open "to verify that everything is ok." *Id.* The door finally swung open. *Id.*

Plain smell of marijuana

Once inside, officers were immediately aware of the smell of burnt marijuana. On a sofa, in plain view, was a baggie of marijuana. *Id.* In a search of the duffle bag left on the balcony, officers discovered about 32 pounds of marijuana, as well as psilocybin mushrooms. *Id.*[2] Officers also noticed money stashed behind a mirror that had been knocked off the wall near the balcony. *Id,*

Officers secured the premises and prepared an affidavit in support of a search warrant. R. 108:14. The defendant and was arrested and advised of his rights per *Miranda.* R. 108:10. Several other people were in the apartment—a 17-year-old girl, her mother and an infant. *Id.*

After the search warrant was obtained, officers seized the marijuana in the duffle bag along with additional controlled substances and miscellaneous paraphernalia. R. 108:6. They found a brown box with several grams of mushrooms underneath a bed in what appeared to be a child's room. *Id.* In the closet next to a crib, they found four bags of

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[2] It is unclear from the record whether the duffle bag was open when officers located the marijuana. During the preliminary hearing, Detective Lyman Smith of the Salt Lake City police department stated that he had been told that the duffle bag was unzipped. R. 108:15. However, he acknowledged, in response to questions from defense counsel, that a police report prepared by another officer suggested that the officers opened the duffle bag. R. 108:15.

marijuana weighing approximately four pounds. *Id.* Officers also found a great deal of marijuana residue or "shake" covering counter tops in the kitchen, the floor and on top of the TV and stereo. R. 108:5.

During a post-*Miranda* interview with Detective Lyman Smith, defendant admitted the marijuana was his and that he was selling it. R. 108:10-11. Defendant said he sells quantities of "a half pound or more. He doesn't do small quantities." R. 108:11. He also said that he "only deals with organic material . . . meaning marijuana and mushrooms, and that's the only stuff he'll deal with and sell." *Id.*

Duffle bag evidence suppressed

Defendant filed a motion to suppress the evidence recovered from the duffle bag, R. 4; 61-63. He argued that evidence recovered pursuant to the search warrant was "fruit of the poisonous tree," because the warrant was based on an unlawful search of the duffle bag. R. 62.

On March 20, 2006, the trial court held a hearing on the motion to suppress. R. 107. The State opposed the motion for two reasons. First, defendant had not claimed or demonstrated an interest in the duffle bag and, therefore, had no standing to challenge the search. R. 65-67; 107:5-7. Second, even assuming the duffle bag was illegally searched, the affidavit prepared by Salt Lake police in support of their request for a warrant to search defendant's apartment contained sufficient additional information—the smell of burnt marijuana and the baggie of green leafy material in plain view on the sofa—to support probable cause. R. 67-70.

After the court took the State's argument on lack of standing under advisement, R. 107:7, the State called Detective Doug Teerlink, Salt Lake City Police Department, to testify concerning the circumstances of defendant's arrest and the search of the duffle bag. R. 107:8. Detective Teerlink, one of several officers who responded to the scene, prepared the affidavit for the search warrant for the apartment. R. 107:9. He began to discuss information provided from other officers for use in the affidavit when defendant's counsel objected to the testimony as hearsay. R. 107:8-9. The court sustained the objection. R. 107:9.[3]

Detective Teerlink then started to recount the circumstances that led to the seizure of the marijuana in the duffle bag, but defense counsel once again objected. R. 107:9-10. The court again sustained the objection. R. 107:10.

At the hearing's conclusion, the court took the matter under advisement and later granted the motion to suppress. The court stated: "The warrantless search of the black duffel bag violated [defendant's] rights." R. 91 (Findings of Fact and Conclusions of Law, dated April 3, 2006), Addendum B. For that reason, "[t]he contents of the duffel bag and all items recovered thereafter are fruits of the poisonous tree" and must be suppressed. *Id.* The court also concluded that defendant had standing to challenge the search of the duffle bag. *Id.*

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[3] The court erred in sustaining the hearsay objection because the rules of evidence do not apply in suppression hearings. *See, e.g. State v. Clifford*, 1999 WL 33244693 (Utah. App.) (Memorandum Decision), Addendum C; *see also* Utah R. Evid. 1101(b)(1) and Utah R. Evid. 104(a). "A defendant who wishes to make an evidentiary challenge . . must proceed to trial and make the evidentiary challenge there." *Id.* n.1.

SUMMARY OF ARGUMENT

Point I: The trial court erred in determining the defendant had established "standing" to challenge the admission of the evidence recovered from the duffle bag. Defendant offered no evidence at the suppression hearing, and the record does not demonstrate, that defendant had a legitimate expectation of privacy in the duffle bag. Thus, the court erred in determining defendant had Fourth Amendment standing.

Point II: Even without the 32 pounds of marijuana recovered from the duffle bag, the search affidavit provided sufficient information to support probable cause to search defendant's apartment. The affidavit stated that officers responding to a report of a robbery observed the furtive, evasive behavior of two men who appeared determined to elude officers and remove the duffle bag from the apartment. Once officers were admitted to the apartment, they immediately smelled burnt marijuana and saw a baggie of what appeared to be marijuana sitting on a sofa. Thus, even assuming that the initial search of the duffle bag was unlawful and that it cannot be used to support probable cause, the search affidavit still contained sufficient information to support probable cause for a search of defendant's apartment.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT DEFENDANT HAD STANDING TO FILE A MOTION TO SUPPRESS THE CONTENTS OF THE DUFFLE BAG.

Defendant presented no evidence to support his claim that he had a reasonable expectation of privacy in the duffle bag and the trial court, accordingly, erred in concluding

that defendant had Fourth Amendment standing to contest the recovery of 32 pounds of marijuana from the duffle bag.

"Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 134 (1978); *accord United States v. Betancur*, 24 F.3d 73, 76 (10th Cir. 1994); *State v. Webb*, 790 P.2d 64 (Utah App. 1990). Accordingly, the exclusionary rule may not redound to the benefit of those who have no reasonable interest in the item or place searched. *Id.* A defendant who moves to suppress evidence is required to establish his Fourth Amendment standing. *State v. Marshall*, 791 P.2d 889, 887 (Utah App. 1990). Once the State objects to a defendant's "standing" to challenge a search, "[t]he defendant must factually demonstrate that he does have standing to contest the warrantless search." *Id.* As the Utah Supreme Court has stated:

> Evidence is admissible . . .until the accused has established that his rights under the rule have been invaded. Therefore, it is entirely proper to require of one who seeks to challenge the legality of a search . . . that he establish that he himself was a victim of an invasion of privacy. . . .

State *v. Montayne*, 414 P.2d 958, 960 (Utah 1966); *accord State v. Atwood*, 831 P.2d 1056, 1057 (Utah App. 1992) (finding that "the existence of a reasonable expectation of privacy must be established by the party challenging the police conduct."). Indeed, Fourth Amendment standing is a "threshold requirement that a defendant must satisfy in order to establish a violation of constitutional rights." *Atwood*, 831 P.2d at 1058.

To establish Fourth Amendment standing, a defendant must prove that he or she has "a legitimate expectation of privacy" in the place or thing searched. *Rakas*, 439 U.S. at 140. In addressing whether a defendant has a legitimate expectation of privacy, the court

determines "first, whether the defendant 'exhibited an actual (subjective) expectation of privacy,' and second, whether that subjective expectation is 'one that society is prepared to recognize as reasonable.'" *Webb*, 791 P.2d at 80 (quoting *United States v. Knox*, 839 F.2d 285 (6th Cir.), *cert. denied*, 490 U.S. 1019 (1988). Factors relevant to this inquiry include whether the defendant had any possessory or proprietary interest in the place searched or the item seized; was legitimately on the premises; could exclude others from that place; exhibited a subjective expectation that the place would remain free from governmental invasion; or took normal precautions to maintain his privacy. *Id.*

Establishing Fourth Amendment standing to contest the search of a residence does not necessarily mean a defendant has standing to contest the search of items or containers inside the residence. *See, e.g., Webb*, 790 P.2d at 83 (defendant lacked standing to challenge search of wife's purse). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed." *Id.* (citing *Rakas*, 439 U.S. at 134).

The trial court ruled defendant had standing to challenge the search of the duffle bag. R. 91. This conclusion is premised on the apparent factual finding that defendant lived at the apartment that was searched pursuant to the warrant. *See* R. 90 ("Salt Lake City officers entered the apartment of Mr. Garcia"). However, there was no evidence introduced at the suppression hearing to indicate that defendant lived at the apartment. Nor was there any evidence to suggest defendant owned the duffle bag. Thus, defendant has not met the

threshold requirement to establish that he has standing to challenge the search of the duffle bag or, for that matter, the apartment. *See Webb*, 790 P.2d at 80 (defendant testifies at suppression hearing for limited purpose of establishing residence and standing to bring motion).

Defendant could have offered evidence that he lived at the apartment. At defendant's preliminary hearing, Detective Lyman Smith testified that he interviewed defendant following his arrest and that defendant stated that he rented a room at the apartment. R. 4 (Information; Probable Cause Statement, signed by Detective D. Findlay, dated October 18, 2005)*; see also* R. 20 (jail booking sheet with defendant's address). Defendant also said he was "staying in the north bedroom," R. 108:6, although it appears that the defendant's brother is the primary renter. R. 108:10.

However, the evidence that might support a claim that defendant had an interest in the duffle bag is tenuous at best. The record indicates that the balcony where the duffle bag came to rest was connected to the bedroom where defendant had been staying. R. 108:7. Defendant also told Detective Smith that the "marijuana was his and didn't belong to anybody else but him." R. 108:10. Defendant said he sold quantities of "a half pound or more. He doesn't do small quantities." R. 108:11. He also said that he "only deals with organic material . . . meaning marijuana and mushrooms, and that's the only stuff he'll deal with and sell." *Id.*

Thus, by his own admission, defendant clearly has an interest in at least some of the marijuana. But his statements do not establish that he had an interest in the duffle bag,

which could have belonged to him, his brother, his brother's wife, or perhaps even the wife's mother, all of whom were present in the apartment when police entered. R. 108:9-10. This is insufficient to establish standing. Even if the meager evidence from defendant's statements that he stayed at the apartment were sufficient to establish standing to contest the search of the apartment, there is no evidence establishing that defendant had a legitimate expectation of privacy in the duffle bag. *See, e.g., Webb*, 790 P.2d at 83. Without more, defendant has not shown that he had standing to challenge the search and the trial court's conclusion is, thus, erroneous.

II. EVEN WITHOUT THE EVIDENCE FROM THE DUFFLE BAG, POLICE HAD PROBABLE CAUSE TO PROCURE A SEARCH WARRANT.

Even assuming the trial court was correct in finding Fourth Amendment standing, the court erred in failing to consider whether the search warrant affidavit was sufficient without the duffle bag evidence. This error is fatal to the trial court's ruling and requires reversal or, at minimum, remand to consider whether the redacted search affidavit provides probable cause for the warrant.

The "core rationale" behind the exclusionary rule and the suppression of evidence is "that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Nix v. Williams*, 467 U.S. 431, 442 (1984). However, the deterrence rationale serves no purpose when "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Id.* at 444. The *Nix* court explained that

admitting otherwise tainted evidence is fair because the State gains no advantage and defendant suffers no prejudice. *See id.* at 447. "Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct." *Id.*

When a defendant challenges the legality of evidence included in an affidavit submitted to support probable cause for a search warrant, the defendant is entitled to an evidentiary hearing. *State v. Nielsen,* 727 P.2d 188, 191 (Utah 1986); *see also Franks v. Delaware*, 438 U.S. 154 (1978). To successfully challenge the validity of a search made pursuant to a warrant, the defendant must establish (1) the affidavit supporting the warrant contains a false statement by the affiant made intentionally, knowingly, or recklessly and (2) the affidavit is insufficient to support probable cause once the misstatement is removed. *Id.* (citing *Franks*, 483 U.S. at 171-72). As the Utah Supreme Court put it:

> The obvious purpose of *Franks* and its progeny is to avoid suppressing evidence when the actual facts, if known to the magistrate, would have resulted in a finding of probable cause. Deterrence of police misconduct is not to be a factor in the decision to suppress unless the misconduct materially affects the finding of probable cause.

Id.

Courts have construed the *Franks* requirement to apply to the use of illegally obtained evidence, which must also be excluded from consideration of the warrant's sufficiency. "[W]hen faced with a warrant containing information obtained pursuant to an illegal search, a reviewing court must excise the offending information and evaluate whether what remains is sufficient to establish probable cause." *United States v. Dessesaure*, 429 F.3d 359, 367 (1st

Cir. 2006); *accord United States v. Jenkins*, 396 F.3d 751, 758-59 (6th Cir.2005). ("[A]uthority from this and other circuits, as well as the principles underlying the *Murray* rule, support an interpretation of the independent source rule that incorporates consideration of the sufficiency of the untainted affidavit to see if probable cause exists without the tainted information.") (citing *Murray v. United States*, 487 U.S. 533 (1988)); *United States v. Restrepo*, 966 F.2d 964, 970 (5th Cir. 1992) ("[T]he district court should consider whether the warrant affidavit, once purged of tainted facts and conclusions, contains sufficient evidence to constitute probable cause for issuance of the warrant"); *State v. Bilant*, 36 P.3d 883, 889, ¶ 26 (Mont. 2001) ("When a search warrant is based, in part, on illegally obtained information, the reviewing court shall excise the illegal evidence from the application and review the remaining information de novo to determine whether probable cause supported the issuance.").

Thus, if a trial court concludes that some of the evidence in the search warrant affidavit was improperly included, then it must proceed to the second part of the *Franks* test and determine whether the remaining untainted evidence in the search affidavit may still establish probable cause. Here, the trial court never performed the second step in the *Franks* analysis. Despite the urging of the State, R. 68-69, the court granted the motion to suppress the evidence without considering whether the affidavit established probable cause absent the allegedly tainted evidence. Had the court performed that test, the result in this case would have been different. The affidavit in support of the search warrant recounts the officers' discovery of the plain smell of freshly burnt marijuana as well as "a baggie of a green leafy

substance in plain view on a couch." R. 74. This discovery was preceded by the report of a robbery and the furtive, evasive behavior of the two men who apparently attached great importance to the duffle bag, which they were desperately attempting to remove from the apartment. *Id.*; *see State v. Church*, 2002 WL 31840887 (Del. Super. Ct.), (suspect's backpack deemed "suspicious" by police because drug traffickers transport large quantities of marijuana in duffle bags, backpacks, trash bags, and cardboard boxes) Addendum C. If the trial court had properly reviewed the redacted warrant, it would have or at least *should* have concluded that the officers had probable cause for the search. *State v. South*, 885 P.2d 795, 800 (Utah App. 1994) (smell of burnt marijuana emanating from a home provides officers with probable cause to seek a warrant), *rev'd on other grounds*, 924 P.2d 354 (Utah 1996); *State v. Duran*, 2005 UT App 409, ¶ 22, 131 P.3d 246 (smell of burning marijuana provides probable cause, but not exigent circumstances, so officers must seek a warrant); *see also Bilant*, 36 P.3d at 889, ¶ 28 (Mont. 2001) (investigative subpoena for defendant's medical records supported by probable cause, despite officer's illegal phone inquiry to defendant's medical provider, because defendant admitted at accident scene that he had been drinking and had taken prescription medication); *State v. Beeken*, 585 N.W.2d 865, 874 (Neb. App. 1998) (mention in search affidavit of discovery of "roach clip" during illegal search did not invalidate search warrant, which was amply supported by probable cause without the roach clip); *see People v. Cohen*, 496 N.E.2d 1231, 1234 (Ill. App.1986) (trained officer detecting odor of burnt marijuana establishes probable cause of substance's presence); *cf. United States v. Shamaezideh*, 80 F.3d 1131, 1139 (6th Cir. 1996) (when

information gleaned from illegal search excised, statement from upstairs resident that "other occupants of the house were growing marijuana" did not support probable cause for search of basement apartment).

In short, the trial court committed reversible error in failing to conduct a proper *Franks* analysis to determine if the redacted affidavit supported probable cause to search defendant's apartment.

CONCLUSION

For the foregoing reasons, this Court reverse the trial court's suppression order, first, because the court erred in concluding defendant had Fourth Amendment standing and, second, because the search affidavit supported probable cause despite the illegal search of the duffle bag. Alternatively, this Court should remand with instructions to the trial court to conduct a *Franks* inquiry to determine if the affidavit supported probable cause

RESPECTFULLY SUBMITTED this 2nd day of October, 2006.

MARK L. SHURTLEFF
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2006 I caused to be U.S. Mail two copies of the foregoing to:

Joan C. Watt
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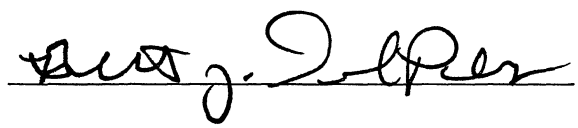

Addenda

Addendum A

IN THE THIRD DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No._____

COUNTY OF SALT LAKE, STATE OF UTAH

To any peace officer in the State of Utah.

Proof by Affiant under oath having been made this day before me by Detective Doug Teerlink, I am satisfied that there is probable cause to believe:

That your affiant has reason to believe that on the premises known as 1703 South 700 East apartment C, further described as a triplex constructed of grey brick with white trim. The structure is located on the southeast corner of 1700 South 700 East and the front of the triplex faces to the west. The numbers 1703 are clearly above the front porch of the triplex in black letters. There are stairs leading from the front porch up to apartment C. The stairs are located on the south side of the structure. The letter C is printed on the north side of the stairs and is black in color. The door to apartment number C is located at the top of the stairs, it is white in color and faces to the south. And all rooms, attics, and other parts therein and the surrounding grounds and any garages, storage rooms, and out buildings of any kind located upon the curtilage of the complex which are designated for the use of apartment C.

In the City of Salt Lake City, State of Utah, There is now certain property or evidence described as:

Marijuana, further described as a green leafy substance; material related to the possession or distribution of marijuana including bags, scales, measuring devices; and drug paraphernalia described as rolling papers or pipes used for smoking marijuana.

Articles of personal property tending to establish and document sales of a controlled substance including U.S. currency, buyer and seller lists, and other documentation of sales of a controlled substance; articles tending to establish the identity of persons in control of the premises sought to be searched including rent receipts, utility receipts, and addressed envelopes, and any other fruits or instrumentality's of the crimes of possession or distribution of a controlled substance.

And that said property or evidence was unlawfully acquired or is unlawfully possessed; or has been used to commit or conceal a public offense; or is being possessed with the purpose to use it as a means of committing or concealing a public offense and consists of an item or constitutes evidence of illegal conduct possessed by a party to the illegal conduct.

You are therefore commanded at anytime day or night (good cause having been shown) to make a search of the above described premises for the hereinabove described property or evidence and if you find the same or any part thereof, to bring it before me at the Third District Court, County of Salt Lake, State of Utah, or retain such property in your custody, subject to the order of this court.

GIVEN UNDER MY HAND and dated this 12 day of October 2005. (3:30 a.m.)

Judge of the Third
District Court

IN THE THIRD DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

STATE OF UTAH)
: ss
County of Salt Lake)

The undersigned affiant being first duly sworn, deposes and says:

That your affiant has reason to believe that on the premises known as 1703 South 700 East apartment C, further described as a triplex constructed of grey brick with white trim. The structure is located on the southeast corner of 1700 South 700 East and the front of the triplex faces to the west. The numbers 1703 are clearly above the front porch of the triplex in black letters. There are stairs leading from the front porch up to apartment C. The stairs are located on the south side of the structure. The letter C is printed on the north side of the stairs and is black in color. The door to apartment number C is located at the top of the stairs, it is white in color and faces to the south. And all rooms, attics, and other parts therein and the surrounding grounds and any garages, storage rooms, and out buildings of any kind located upon the curtilage of the complex which are designated for the use of apartment C.

In the City of Salt Lake City, State of Utah, There is now certain property or evidence described as:

Marijuana, further described as a green leafy substance; material related to the possession or distribution of marijuana including bags, scales, measuring devices; and drug paraphernalia described as rolling papers or pipes used for smoking marijuana.

Articles of personal property tending to establish and document sales of a controlled substance including U.S. currency, buyer and seller lists, and other documentation of sales of a controlled substance; articles tending to establish the identity of persons in control of the premises sought to be searched including rent receipts, utility receipts, and addressed envelopes, and any other fruits or instrumentality's of the crimes of possession or distribution of a controlled substance.

And that said property or evidence was unlawfully acquired or is unlawfully possessed; or has been used to commit or conceal a public offense; or is being possessed with the purpose to use it as a means of committing or concealing a public offense and consists of an item or constitutes evidence of illegal conduct possessed by a party to the illegal conduct.

Your affiant believes the property and evidence described above is evidence of the crime(s) of Distribution and Possession of a Controlled Substance.

THE FACTS TO ESTABLISH THE GROUNDS FOR ISSUANCE OF A SEARCH WARRANT ARE:

Your affiant is a Salt Lake City Police Officer and has been a police officer for over 5 years. Your affiant is currently assigned to the Salt Lake City Police Department's Narcotic Unit and investigates narcotic related offenses. Your affiant has had training in narcotics identification and in the investigation of narcotic related offenses through the Utah Police Academy and the California Narcotics Association. Your affiant's specialized training includes the DEA Clandestine Laboratory Course. Your affiant has worked street level drug interdiction as an arresting officer and as an undercover police officer. Your affiant has seen several different types of narcotics during these operations. Your affiant has been involved with over 300 drug related cases, many of which were felonies.

Your affiant has reason to believe that the individuals who reside or otherwise occupy 1703 South 700 East apartment C are engaging in a narcotics distribution operation.

On the evening of October 11, 2005 Salt Lake City Police Officers responded to the listed apartment on a possible robbery in progress call. The female complaint was at the listed address in apartment A. Apartment A is below apartment C. She said that she heard people upstairs in the above apartment. She then saw three males leaving apartment C and running away. One of males was wearing a ski mask. When Police Officers arrived a short time later, they heard yelling coming from the listed apartment. The Officers then saw a male adult coming out of the listed apartment. He was wearing a stocking cap and carrying a duffel bag. Police Officer challenged the male and he ran back into the apartment. Police Officers knocked on the apartment door and the persons inside said everything is ok but they would not open the door. Police Officers then observed the male who was carrying the duffel bag go out the back door onto a balcony. Someone from inside the apartment handed the male the duffel bag. Police Officers challenge the male again. The male dropped the duffel bag and went back into the apartment. Police Officer told the persons inside the apartment that they needed to come in and verify that everything is ok. Officers told the persons in the apartment to open the door or they would kick it in. The persons inside the apartment then let the police into the apartment.

The Police Officers who went into the apartment could smell a strong smell of fresh burnt marijuana in the apartment. They observed a small baggie of a green leafy substance in plain view on a couch. Officers found that duffel bag the male dropped on the balcony contained large amounts of a green leafy substance that appears to be marijuana. The Officers also observed that a mirror had been knocked off the wall near the balcony had some money hidden behind it.

Your affiant desires to enter 1703 South 700 East and search for marijuana, marijuana paraphernalia and other items related to the distribution of marijuana. The paraphernalia includes such items as pipes, bongs, rolling papers or tubes used to inhale or smoke marijuana. Other related items include packaging material used to package marijuana and scales used to weigh quantities. Your affiant knows from training and experience that these items are almost

always found on the premises where search warrants for controlled substances have been executed.

Your affiant desires to search for records of marijuana sales, both written and electronic, residency papers and U.S. currency. Your affiant knows from past experiences with narcotic investigations that persons sometimes record their sales to show dates, amounts purchased and drug indebtedness. Your affiant knows from training and experience that marijuana is sold for money or stolen property.

This application for search warrant has been reviewed and approved for presentation to the court by Deputy District Attorney Bill Kendall.

WHEREFORE, your affiant prays that a search warrant be issued for the seizure of said items any time day or night because there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, or altered, or for other good reasons to wit:

Police Officers are currently securing the listed apartment until the search warrant is written and signed.

Detective Doug Teerlink
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 12 day of October 2005. (3:30 a.m.

Judge of the Third
District Court

Addendum B

STEVEN G. SHAPIRO (#6330)
SALT LAKE LEGAL DEFENDER ASSOCIATION
Attorney for Defendant
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiff,	:	
v.	:	
JOHN ANGELO GARCIA,	:	Case No. 051907326FS JUDGE J. DENNIS FREDERICK
Defendant.	:	

This matter having come before the Court for argument on March 20, 2006, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. On October 12, 2005, Salt Lake City Police officers entered the apartment of Mr. Garcia.

2. Officers located and searched a large black duffel bag which contained a large quantity of marijuana without first having obtained a search warrant.

3. Officers immediately thereafter requested and obtained a search warrant for the apartment.

4. Additional evidence was located pursuant to the subsequent search.

Conclusions of Law

Based on the facts as determined above, the Court makes the following Conclusions of Law:

1. Mr. Garcia has standing to contest the search of the black bag as the bag was located inside his residence.

2. The warrantless search of the black duffel bag violated Mr. Garcia's rights under the Fourth Amendment to the United States Constitution.

3. The contents of the black duffel bag and all items recovered thereafter are fruits of the poisonous tree and must accordingly be suppressed.

4. Defendant's Motion to Suppress Evidence is Granted.

DATED this 31st day of ~~March,~~ April 2006.

Judge Dennis Frederick

SALT LAKE CITY COUNTY STATE OF UTAH DISTRICT COURT

Agreement as to form:
Sandi Johnson

MAILED/DELIVERED a copy of the foregoing to the office of the District Attorney, 1111 East 300 South, Salt Lake City, Utah 84111, this 30 day of March, 2006.

Addendum C

C
Only the Westlaw citation is currently available.
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.
STATE of Delaware
v.
Khyon E. CHURCH, Defendant.
No. 0104008667.

Submitted Oct. 21, 2002.
Decided Dec. 18, 2002.

Upon Defendant's Consolidated Motion to Supress Evidence Denied.

Joelle M. Wright, Deputy Attorney General, New Castle County, State of Delaware, for the State of Delaware.
Joseph A. Hurley, for Defendant.

ORDER

ABLEMAN, J.

***1** This is the Court's decision on a Consolidated Motion to Suppress Evidence seized during a search of Khyon E. Church's ("Defendant") residence located at 6 S. Gray Avenue, Wilmington, Delaware. Following the search, which was incident to a warrant, Defendant was charged by a Grand Jury indictment with numerous drug and weapons offenses including Trafficking in Cocaine and Possession of a Firearm During the Commission of a Felony.[FN1] Defendant submits that the evidence should be suppressed because the affidavit in support of the search warrant lacked probable cause to support a search of the 6 S. Gray Avenue premises. Specifically, Defendant claims that the affidavit failed to establish a nexus between the items sought and the Defendant's residence, thereby violating his rights under the Fourth Amendment to the United States Constitution and Article 1, § 6 of the Delaware Constitution. As will be discussed more fully hereafter, since the four corners of the affidavit meet the probable cause standard for the issuance of a search warrant, the Consolidated Motion to Suppress is denied.

FN1. On May 15, 2001, Defendant was indicted on the following offenses: Trafficking in Marijuana in violation of Title 16, § 4753(a)(1)(a) of the Delaware Code; Trafficking in Cocaine in violation of Title 16, § 4753A(a)(2)(a) of the Delaware Code; Possession With Intent to Deliver a Non-Narcotic Schedule I Controlled Substance in violation of Title 16, § 4752 of the Delaware Code; Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance in violation of Title 16, § 4751 of the Delaware Code; Possession of a Firearm during the Commission of a Felony in violation of Title 11, § 1447A of the Delaware Code; Use of a Dwelling for Keeping Controlled Substances (1725 W. 2nd Street) in violation of Title 16, § 4755(a)(5) of the Delaware Code; Use of a Dwelling for Keeping Controlled Substances (6 S. Gray Avenue) in violation of Title 16, § 4755(a)(5) of the Delaware Code; Use of a Vehicle for Keeping Controlled Substances in violation of Title 16, § 4755(a)(5) of the Delaware Code; Possession of Drug Paraphernalia in violation of Title 16, § 4771 of the Delaware

Code; Possession of a Controlled Substance Within 300 Feet of a Park or Recreation Area in violation of Title 16, § 4768 of the Delaware Code.

Statement of Facts

During the first week of March 2001, Officers Vincent Jordan and Hector Cuadrado of the City of Wilmington Police Department were contacted by a past proven reliable informant who advised them that a black male, known only as "Ky," was selling large amounts of marijuana from his dwelling at 1725 W. 2nd Street in the City of Wilmington. The officers then contacted the security division of Conectiv Power and learned that the utilities for 1725 W. 2nd Street were registered in the name of Khyon E. Church. Checks for driver's license, social security number, and Department of Motor Vehicles photographic identification confirmed these connections. Although the Department of Motor Vehicles identified Defendant's registered address as 2 Commonwealth Boulevard, New Castle, Delaware, the social security number associated with the driver's license matched the social security number in the records of Conectiv Power. Thus, the identification investigation results all positively matched the Defendant with the premises located at 1725 W. 2nd Street.

Based on the foregoing information, the officers commenced surveillance of 1725 W. 2nd Street during the fourth week of March 2001. While conducting surveillance, the officers observed a black male whom they believed to be the Defendant leave the premises with another unknown male who was carrying a backpack. Both males entered a dark colored 1994 Lexus and proceeded to 6 S. Gray Avenue. The police officers' experience led them to be suspicious since drug traffickers transport large quantities of marijuana in duffle bags, backpacks, trash bags, and cardboard boxes.[FN2] The officers responded to 6 S. Gray Avenue and observed Defendant walk to the front door, check his mailbox, and use a key to open the front door and enter the premises. The officers conducted a registration check on the Lexus and learned that the vehicle was registered to William R. Church of 2 Commonwealth Boulevard, New Castle, Delaware, the same address listed on Defendant's driver's license.

FN2. Suppression Hearing Transcript, dated October 15, 2001, at 7 (hereinafter, Suppression Hr'g Tr. at ___.").

***2** The officers continued the surveillance, observing the Defendant leave 6 S. Gray Avenue and return to the Lexus still occupied by the unknown male passenger. Defendant and his passenger proceeded in the Lexus to Up the Creek Restaurant. At this juncture, undercover Detective Henry Cannon of the Wilmington City Police continued the surveillance. Detective Cannon entered the restaurant and observed the Defendant and his passenger seated at a table conversing with a white male whom Detective Cannon believed was an employee of the restaurant. At one point, Defendant and the unidentified white male left the table, entered the restroom, and returned shortly thereafter. Since the two remained in the restroom for such a short span of time, it was Detective Cannon's belief that a drug transaction had occurred in the restroom. Not long after, Defendant and his passenger drove away in the Lexus. The officers followed the Lexus into the center of Wilmington but lost sight of the vehicle.

Later that evening, the officers again conducted surveillance at 6 S. Gray Avenue and observed Defendant's parked Lexus. From all these circumstances, the officers reasonably believed that Defendant was residing at 6 S. Gray Avenue.

During the same week in March 2001, the officers conducted further surveillance at 6 S. Gray Avenue and observed a black Nissan pickup truck parked in the rear driveway of the premises. The officers performed an identification check on the license plate number of the truck and found it was registered to a William R. Church and Erna Church of 2 Commonwealth Boulevard, New Castle, Delaware. This is the same address noted on Defendant's driver's license. The officers continued surveillance of 6 S. Gray Avenue on a daily basis throughout the remainder of March of 2001 and observed both the Lexus and the pickup truck parked at the premises.

Surveillance continued into April. The officers again observed Defendant leave 6 S. Gray Avenue, enter the pickup truck, and drive to a dwelling at 1725 W. 2nd Street, which he entered. On April 12, 2001, officers viewed Defendant arrive at 6 S. Gray Avenue in the pickup truck and unload a motorcycle from the bed of the pickup truck. Shortly thereafter, Defendant drove from 6 S. Gray Avenue in the pickup truck to the area of Second and Scott Streets. Defendant parked the vehicle and carried two large black duffel bags into 1725 W. 2nd Street. The officers could tell that the bags were empty since they were lying flat on Defendant's shoulder. Approximately fifteen minutes later, Defendant was observed leaving the premises with the bags, which now appeared filled and heavy. Defendant placed the bags in the back of the pickup truck. The officers, accompanied by Detective Thomas Dempsey, were in an unmarked car and not in uniform.

According to his testimony, Detective Vincent Jordan parked his unmarked vehicle in a space directly behind Defendant's pickup truck, in such a manner that it did not obstruct Defendant's vehicle from leaving.[FN3] Detective Jordan observed a minivan parked in front of Defendant's vehicle, but there was sufficient room between the front of Defendant's vehicle and the rear of the minivan for Defendant to maneuver his vehicle out of its parking space.

FN3. Suppression Hr'g Tr. at 16.

***3** Detective Jordan approached Defendant's pickup truck, knocked on the window and identified himself as a police officer. At the time, Detective Jordan was wearing his Wilmington Police identification badge around his neck. Detective Dempsey was also dressed in plain clothes, and neither he nor Detective Jordan were displaying their weapons. At the moment Detective Jordan identified himself, it appeared that Defendant pressed the speed dial button on his cellular phone and then placed the phone on the floor of the vehicle. Detective Jordan believed that Defendant was attempting to warn someone on the line that he was being approached. Detective Jordan requested that Defendant step down from the vehicle at which point the Detective reached into the vehicle, picked up the phone, and could hear another male's voice on the phone asking what was going on.[FN4] The Detective closed the flip top phone and asked the names of Defendant and the owner of the vehicle. Defendant responded that his name was Khyon Church and that the pickup truck belonged to his father. When questioned as

to his destination, Defendant responded that he was "going on a trip." [FN5] When asked about the contents of the duffel bags, Defendant replied that they "contained clothing for his trip." [FN6]

FN4. Suppression Hr'g Tr. at 18.

FN5. *Id.*

FN6. Suppression Hr'g Tr. at 19.

After questioning Defendant a second and third time about the contents of the duffel bags, Defendant stated that the bags contained drugs, specifically marijuana.[FN7] Defendant was detained and handcuffed. Defendant's vehicle, and the bags which were still in it, were transported to the Wilmington central police station. Detective Sutton of the K-9 Unit performed a canine search of the bags. The dog was alerted to the scent of marijuana. Once opened, the bags were found to contain a combined quantity of approximately 24.99 pounds of marijuana. Defendant was read his Miranda rights and arrested.

FN7. *Id.*

Upon Defendant's arrest, the officers applied for a search warrant for both 1725 W. 2nd Street and 6 S. Gray Avenue, believing there to be more marijuana plants, drugs, drug monies, paraphernalia and other contraband at these premises. At the time the search warrant was issued, the police officers had reason to believe that the Defendant was actually living at 6 S. Gray Avenue and that he was probably using 1725 W. 2nd Street as a stash house for his drugs and for the proceeds from the sale of drugs. After executing the search warrant at 1725 W. 2nd Street, the officers uncovered approximately 30 pounds of marijuana and two handguns. The search warrant completed at 6 S. Gray Avenue produced approximately 24 grams of powdered cocaine and another handgun.

A hearing on Defendant's Motion to Suppress was conducted on October 7, 2002. [FN8] At the conclusion of the hearing, the Court denied Defendant's motion with respect to all claims, but reserved decision on the issue of the evidence found at 6 S. Gray Avenue. On October 22, 2002, the State filed its response in opposition to the suppression of the evidence recovered from the 6 S. Gray Avenue residence.

FN8. Defendant initially filed his Motion to Suppress on June 20, 2001 and then filed an Amended Motion to Suppress on September 25, 2001. At the suppression hearing originally held on October 15, 2001, the Court denied Defendant's Motion to Suppress based solely on the statement of facts and law contained in the initial Motion to Suppress. As the Court and the State were not made aware of Defendant's Amended Motion to Suppress at the time of the suppression hearing, the Court was unable to address all of the pending issues. Accordingly, the Court vacated the order denying the Motion to Suppress entered on October 15, 2001. Defendant subsequently filed the instant motion on December 6, 2001 and submitted a memorandum of law in support of motion to suppress evidence on May 7, 2002.

Defense Contentions

***4** Defendant contends that the search of 6

S. Gray Avenue violated his Federal and State constitutional rights insofar as the information obtained from his primary detention was tainted. Therefore, Defendant argues, all references to information gathered because of that illegal action represents "fruit of the poisonous tree." Additionally, Defendant maintains that the affidavit in support of the search warrant lacked the necessary probable cause to support a reasonable belief that evidence would be found at the 6 S. Gray Avenue premises.

Standard Of Review

On motions to suppress evidence presented to this Court, the defendant bears the burden of establishing that the challenged search or seizure violated his Fourth Amendment rights.[FN9] Further, it is the defendant who must prove by a preponderance of the evidence that he is entitled to relief.[FN10]

FN9. *Rakas v. Illinois,* 439 U.S. 128, 130 n. 1 (1978); *State v.. Bien-Aime,* Del.Super., Cr. A. No. IK92-08-0326, Toliver, J. (Mar. 17, 1993) (Mem.Op.).

FN10. *Bien-Aime* at 3 (citing *United States v. Casteneda,* 951 F.2d 44, 48 (5th Cir.1992)).

Discussion

The protections afforded in the Fourth Amendment safeguard the public against unreasonable searches and seizures and require that a search warrant may be issued only upon a showing of probable cause supported by oath or affirmation. [FN11] The Delaware Constitution ensures the same fundamental right and security for its citizenry by requiring a showing of probable cause before issuance of a search warrant affidavit upon oath or affirmation.[FN12] The probable cause provision was integrated into the present Delaware Constitution and Declaration of Rights in 1792 and has never been altered.[FN13] The addition of the probable cause provision in 1792 by the framers of Delaware's Declaration of Rights was more than an integral adjunct to the oath requirement for search warrants. It proved to be an invaluable enhancement of the right against illegal searches and seizures rights set forth in Delaware's 1776 Constitution and Declaration of Rights.[FN14]

FN11. The Fourteenth Amendment to the United States Constitution states:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. XIV.

FN12. Article 1, § 6 of the Delaware Constitution provides:
Section 6. The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation. Del. Const. art. 1, § 6.

FN13. *Dorsey v. State*, 761 A.2d 807, 817 (Del.2000); *see also Jones v. State*, 745 A.2d 856 (Del.1999) In *Jones*, the Delaware Supreme Court concluded that the history of the search and seizure provisions in the Delaware Constitution imparted *different* and *broader* protections than those afforded by the Fourth Amendment. *Id.* at 865-66.

FN14. *Dorsey*, 761 A.2d at 817.

In furtherance of the guarantee of protection from unreasonable searches and seizures, our General Assembly has set forth in § 2306 and § 2307 of the Delaware Code the statutory requirements that are necessary for a constitutionally adequate showing of probable cause. The language of § 2306 of Title 11 provides that the affidavit in support of a search warrant:

[S]hall designate the house, place, conveyance or person to be searched and the owner or occupant thereof (if any), and shall describe the things or persons sought as particularly as may be, and shall substantially allege the cause for which the search is made or the offense committed by or in relation to the persons or things searched for, and shall state that the complainant suspects that such persons or things are concealed in the house, place, conveyance or person designated and shall recite the facts upon which such suspicion is founded.[FN15]

FN15. 11 *Del. C.* § 2306.

Delaware courts have interpreted the probable cause standard of § 2306 to require that the underlying affidavit in support of the search warrant must establish sufficient cause for the warrant's issuance.[FN16] The Delaware Supreme Court "has eschewed a hypertechnical approach to the evaluation of the search warrant affidavit in favor of a *common-sense interpretation.*" [FN17] More importantly, "the affidavit supporting the search warrant must be 'considered as a whole and not on the basis of separate allegations.' " [FN18]

FN16. *Wilson v. State*, 314 A.2d 905, 906-907 (Del.1973) (citing *Carroll v. United States*, 267 U.S. 132 (1925)).

FN17. *United States v. Ventresca*, 380 U.S. 102, 109 (1965); *see also Gardner v. State*, 567 A.2d 404, 409 (Del.1989); *Jensen v. State*, 482 A.2d 105, 111 (Del.1984); *Pierson v. State*, 338 A.2d 571, 573-74 (Del.1975); *Edwards v. State*, 320 A.2d 701, 703 (Del.1974); *Wilson v. State*, 314 A.2d 905, 906-907 (Del.1973); (emphasis added).

FN18. *Gardner*, 567 A.2d at 409 (quoting *Jensen v. State*, 482 A.2d at 111) (emphasis added). *Accord Dorsey*, 761 A.2d at 811-812 (upholding the four corners test for probable cause required by 11 *Del. C.* § 2306 in that the four corners of the affidavit must comport with § 2306's requirement that the complaint 'recite the facts' regarding why the items sought would be found at the place to be searched); *Dunfee v. State*, 346 A.2d 173, 175 (Del.1975) (stating that the factual sufficiency of an affidavit is tested by considering it as a whole and not in terns of its isolated component allegations); *Edwards*, 320 A.2d at

703 (noting that when testing for requirements, the affidavit must be considered as a whole, and not in an isolated seriatim fashion); *Rossitto v. State*, 234 A.2d 438, 439-40 (Del.1967) (holding that allegations of an affidavit filed in support of an application for a search warrant may not be isolated each from the other. The affidavit must be considered as a whole); *Mezzatesta v. State*, 166 A.2d 433, 437 (Del.1960) (articulating that the affidavit must be considered as a whole in determining if the allegations justify the issuing of a search warrant).

***5** In issuing a search warrant, a judicial officer must comply with the procedural and substantive requirement of § 2307 as follows:

If the judge, justice of the peace or other magistrate finds that the facts recited in the complaint constitute probable cause for the search, that person may direct a warrant to any proper officer or to any other person by name for service. The warrant shall designate the house, place, conveyance or person to be searched, and shall describe the things or persons sought as particularly as possible ... [FN19]

FN19. 11 *Del. C.* § 2307.

This Court has held that the foregoing two statutory sections establish a four corners test for probable cause.[FN20] There must exist adequate facts on the face of the affidavit so that a reviewing court can verify that probable cause existed for issuance of the warrant.[FN21] It is the duty of a reviewing court to give 'great deference' to the magistrate's or judge's determination that a warrant is supported by probable cause.[FN22] Additionally, there is the requirement that all facts relied upon by the magistrate be in the written affidavit to insure that the reviewing Court may determine whether the constitutional requirements have been met without reliance upon faded and often confused memories.[FN23]

FN20. *Pierson v. State*, 338 A.2d 571, 573 (Del.1975).

FN21. *Id.*

FN22. *United States v. Leon*, 468 U.S. 897, 914 (1984) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

FN23. *Dorsey v. State*, 761 A.2d 807, 811 (Del.2000) (quoting *Pierson v. State*, 338 A.2d 571, 574 (Del.1975)); *Henry v. State*, 373 A.2d 575, 577 (Del.1977).

It is firmly established that the reviewing court must determine whether a search warrant affidavit contained sufficient factual information when issued by a neutral and detached magistrate or judicial officer to form a reasonable belief that an offense has been committed and that seizable property would be found in a particular place or on a particular person.[FN24] In other words, "[t]he critical element in a reasonable search is not that the owner of the property is suspected of a crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." [FN25] A warrant will not be overturned if this probable cause is apparent.[FN26] Moreover, this Court has consistently held that "it is axiomatic that there be a nexus between the

items which are sought and the place in which the police wish to search for them ." FN27

FN24. *Dorsey,* 761 A.2d at 811; *see also Carter v. State,* 418 A.2d 989, 992 (Del.1980); *Edwards,* 320 A.2d at 703; *Wilson,* 314 A.2d at 906-907.

FN25. *Zurcher v. Stanford Daily,* 436 U.S. 547, 556 (1978) (citing *Carroll v. United States,* 267 U.S. 132 (1925)).

FN26. *Hooks v. State,* 416 A.2d 189, 203 (Del.1980) (citing *Brinegar v. United States,* 338 U.S. 160, 175 (1949)).

FN27. *State v. Jones,* 2000 WL 33114361 (Del.Super.) (citing *Dorsey,* 761 A.2d at 811); *Hooks,* 416 A.2d at 203; *Pierson,* 338 A.2d at 573.

Defendant concedes in his motion "that putting aside other alleged constitutional infirmities, there was probable cause to arrest and search. That fact does not, however, justify a search of the Gray Avenue residence." In support of this contention, Defendant relies on the holding in *State v. Jones.* FN28 In *Jones,* this Court held that the affidavit, which supported the search warrant of the defendants' residence, lacked the requisite showing of probable cause. As a result, the evidence seized at the defendants' residence was suppressed. FN29 But *Jones* can be distinguished from the case at bar because the objects to be sought, as specified in the affidavit in *Jones,* included employee payrolls, paperwork relating to defendants' employees, and business records located at the defendants' place of business and residence. A search of defendants' residence instead produced cocaine and handguns. There was no direct evidence on the face of the affidavit that the police had probable cause to believe that cocaine and handguns would be found at defendants' residence. In contrast, based on the information in the affidavit provided by Detectives Jordan, Cuadrado and Janvier, there was ample probable cause for the police to believe drugs, contraband, and associated drug trafficking paraphernalia would be found at 6 S. Gray Avenue. Thus, there was a logical connection between the items sought and the premises searched.

FN28. *State v. Jones,* 1997 WL 528274 (Del.Super.).

FN29. *Id.* at *4.

***6** Defendant similarly relies upon *State v. Ada,* which he purports factually bears the greatest similarity to his case. FN30 In *Ada,* the defendant maintained two separate residences, Apartment C-4, 3501 Lancaster Avenue and 2724 West 4th Street. Although police surveillance, a controlled drug buy, and exigent circumstances substantiated a warrantless search of the Apartment C-4 residence, the Court held that there were insufficient facts set forth in the affidavit of probable cause to form a nexus between the items sought and the West 4th Street residence. FN31 The defendant was observed coming and going from the West 4th Street residence and using a key to enter and lock the front door. Yet, the police observed no illegal or suspicious activity occurring at the residence. FN32 No other objective evidence existed to link the defendant to this residence. FN33

FN30. *State v. Ada,* 2001 WL

660227 (Del.Super.).

FN31. *Id.* at *5.

FN32. *Id.*

FN33. *Id.* at *4.

The objective evidence linking the Defendant to 6 S. Gray Avenue in this case was far more substantial than in *Jones* and *Ada.* During the last week of March 2001, police surveillance revealed Defendant leaving this residence with an unknown black male and traveling to a restaurant to conduct what appeared to be a drug transaction. Additionally, police had observed Defendant's Lexus and a pickup truck on several occasions parked at 6 S. Gray Avenue as well as at 1725 W. 2nd Street. Police monitored Defendant traveling at different times in both vehicles to and from these two residences. The police could reasonably have concluded based on information provided in the affidavit, that Defendant was living at 6 S. Gray Avenue and storing his drugs at 1725 W. 2nd Street. Based upon the trips to and from the residences observed by police, the likelihood was great that drugs and associated paraphernalia would be uncovered at both addresses. In *Ada,* the contested search warrant was executed at West 4th Street, believed to be the defendant's stash house, not his residence. Here, the search performed at 6 S. Gray *was* the Defendant's residence. The information contained in the four corners of the *Ada* affidavit pertaining to the officers' experience with regard to drugs being kept in the home was not applicable to the West 4th Street stash house. The facts set forth in the search warrant affidavit in this case were specific with respect to the items sought at 6 S. Gray Avenue. Also, the tip in *Ada* originated from a concerned citizen, rather than from a past proven and reliable informant as in this instance.[FN34]

FN34. *Id.* at *1.

Adopting the common sense interpretation laid down by the Delaware Supreme Court, the Court has reviewed the four corners of the search warrant affidavit in this case and finds that the factual circumstances and information contained therein were sufficient to warrant the police officers to believe that drugs, drug paraphernalia, and contraband would be found at 6 S. Gray Avenue. Upon examination of the factual adequacy of the affidavit as a whole, and not in terms of its isolated component allegations, sufficient probable cause exists to establish a nexus between the items that were sought and Defendant's residence due to the following factors: 1) a past proven and reliable informant contacted police that a black male known as "Ky" was selling large amounts of marijuana from 1725 W. 2nd Street; 2) Defendant and an unidentified male were observed leaving 1725 W. 2nd Street, traveling to 6 S. Gray Avenue, whereupon Defendant checked his mail, entered, then exited the residence and drove to Up The Creek Restaurant to conduct a probable drug sale; 3) Defendant's Lexus and pickup truck were observed parked at 1725 W. 2nd Street and 6 S. Gray Avenue on a daily basis; 4) Defendant was observed traveling from 6 S. Gray Avenue to 1725 W. 2nd leading police to believe that he was using 6 S. Gray Avenue as a residence and 1725 W. 2nd as a stash house for his drugs; 5) Defendant was observed leaving 6 S. Gray Avenue, traveling to and entering 1725 W. 2nd Street with empty duffel bags, and exiting with full bags; 6) the affiants' statement that, based on their training,

experience, and participation in other drug investigations, it is common for drug traffickers to secrete contraband, proceeds of drug sales and records of drug transactions in secure locations within their residence and/or businesses for their ready access and to conceal the same from law enforcement officers; and 7) the affiants' statement that drug traffickers only transport enough drugs that they will need for a sale and generally maintain the rest of their drugs at a secured location, including, but not limited to, their residence.

*7 Within the parameters of the Fourth Amendment and Article 1, § 6 of the Delaware Constitution, there is a fundamental distinction between probable cause to arrest and probable cause to search. Probable cause to arrest concerns a "person" and whether a criminal act has been committed or is being committed by a person to be arrested. Probable cause to search involves a "place" and whether evidence or illegal instrumentalities will be discovered in a particular location. In *United States v. Whitner,* the Third Circuit upheld the contention embedded in the Fourth Amendment that "probable cause to arrest does not automatically provide probable cause to search the arrestee's home." [FN35] In *United States v. Jones,* the Third Circuit stated, however, "although probable cause to arrest does not automatically provide probable cause to search the defendant's home, the fact that probable cause to arrest has been established increases the probability that the defendant is storing evidence of that crime in the defendant's residence." [FN36] By Defendant's own admission in his motion, there was probable cause to arrest. Based on the outcome of police surveillance efforts in the months of March and April, 2001, and the evidence obtained upon Defendant's arrest detailed in the affidavit, law enforcement officials could reasonably believe that drugs were being stored at 6 S. Gray Avenue.

FN35. *United States v. Whitner,* 219 F.3d 289, 297 (3rd Cir.2000) (quoting *United States v. Jones,* 994 F.2d 1051, 1055 (3rd Cir.1993); *Dorsey,* 761 A.2d at 812.

FN36. *United States v. Jones,* 994 F.2d at 1055-56.

In consideration of the information supplied by the past proven and reliable informant as to drug dealing from 1725 W. 2nd Street, the affiants' personal observations of the Defendant, and the experience of the police officers fully enumerated in the affidavit, the Court finds that the issuing judicial officer possessed sufficient grounds to reasonably believe that the items listed in the search warrant would be found at 6 S. Gray Avenue. In *State v. Jones,* this Court affirmed that, "[D]irect evidence that items will be present at the premises to be searched pursuant to the warrant is not always required in a search warrant." [FN37] The lack of "direct evidence," e.g., a controlled drug purchase made from 6 S. Gray Avenue and/or an informant's tip that the Defendant maintained or sold drugs from 6 S. Gray Avenue, within the four corners of the search warrant, to suggest that drugs or contraband could be seized at 6 S. Gray Avenue, does not negate the adequacy of a finding of probable cause. Defendant's conduct leading up to his arrest and possession of large quantities of marijuana upon his arrest provided police with more than mere fodder or suspicion that the Defendant stored contraband or drugs in his residence at 6 S. Gray Avenue.

FN37. *Jones,* 1997 WL 528274, at *4 (quoting *Hooks,* 416 A.2d at 203); *United States v. Maestas,* 546 F.2d 1177, 1180 (5th Cir.1977).

In *State v. Jones,* the defendant similarly argued that the four corners of the search warrant lacked probable cause to support a belief that marijuana would be found at his residence, and that it was mere speculation that the police thought that defendant kept contraband or drugs in his residence. [FN38] In support of his allegation, defendant stressed the fact there were no controlled buys from the residence, no surveillance of the residence, and no informant who told police that defendant kept drugs in his residence . [FN39] The *Jones* Court found probable cause existed *even* in the absence of the above three elements.[FN40] In the case at bar, while there were no controlled buys or information provided by an informant, information obtained through law enforcement surveillance efforts, coupled with other specific facts provided in the affidavit, established the requisite nexus between the items sought and the Defendant's residence.

FN38. *State v. Jones,* 2000 WL 33114361, at *2 (Del.Super.).

FN39. *Id.*

FN40. *Id.* at *4 (emphasis added).

***8** Moreover, in *Jones,* this Court held that "a police officer's training and experience may be taken into consideration in determining probable cause *when combined with other factors.*" [FN41] In addition to the factual items previously discussed, the affidavit contained significant information attesting to the affiants' experience and training in drug investigations, further substantiating the Court's finding of sufficient probable cause.

FN41. *Id.* (emphasis added).

The recent Fourth Circuit case of *United States v. Hargis,* significantly mirrors the circumstances surrounding Defendant's claim of insufficient probable cause.[FN42] In *Hargis,* the defendant asserted that the warrant was facially invalid because it lacked the necessary probable cause, having omitted any evidence of a nexus between defendant's drug trafficking and his residence.[FN43] Despite his assertion, the Court held that the affidavit did provide strong support for probable cause to search Defendant's residence. [FN44] The affidavit contained reliable information that: 1) the defendant brought drugs to the location of his drug dealing in his car from another location; 2) the defendant was observed on several occasions going back and forth between his residence and the location of his drug dealing; and 3) the police officer stated that, based on his training and experience, street-level dealers frequently store drugs in their homes.[FN45] In this case, the same factual elements, and perhaps more, were present to implicate 6 S. Gray Avenue in Defendant's drug trafficking enterprise.

FN42. *United States v. Hargis,* 2002 WL 1336658 (4th Cir.(Md.)).

FN43. *Id.* at *1.

FN44. *Id.*

FN45. *Id.*

Conclusion

Based on the foregoing facts and statements

contained within the four corners of the affidavit in support of the search warrant and the fact that probable cause existed to arrest Defendant, this Court finds sufficient probable cause was established to execute a valid search of 6 S. Gray Avenue. Accordingly, there are sufficient specific facts set forth in the affidavit to form a nexus between the items that were sought and Defendant's residence.

Defendant has failed to demonstrate by a preponderance of the evidence that the challenged search and seizure violated his Fourth Amendment rights. For all the foregoing reasons, Defendant's Consolidated Motion to Suppress is hereby DENIED.

IT IS SO ORDERED.

Del.Super.,2002.
State v. Church
Not Reported in A.2d, 2002 WL 31840887 (Del.Super.)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,

v.

Vernon E. CLIFFORD, Defendant and Appellant.

No. 971681-CA.

April 8, 1999.

Catherine E. Lilly and Matthew G. Nielsen, Salt Lake City, for appellant.
David E. Yocom and Trina A. Higgins, Salt Lake City, for appellee.

Before GREENWOOD, BENCH, and DAVIS, JJ.

MEMORANDUM DECISION (Not for Official Publication)

BENCH.

***1** Inventory searches are a well recognized exception to the warrant requirement of the Fourth Amendment. *See State v. Hygh,* 711 P.2d 264, 267-68 (Utah 1985) (citing *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092 (1976)). "In order to support a finding that a valid inventory search has taken place, the court must first determine whether there was reasonable and proper justification for the impoundment of the vehicle." *Id.* at 268. The State must also show " 'that there exists an established reasonable procedure for safeguarding impounded vehicles and their contents and that the challenged police activity was essentially in conformance with that procedure.' " *Id.* at 269 (quoting 2 Wayne H. LaFave, *Search & Seizure* § 7.4 at 576-77 (1978)).

Defendant concedes that his vehicle was justifiably impounded. He argues, however, that the trial court erred in finding the inventory search valid because the State failed to meet its burden to establish that a standardized procedure for inventory searches existed and that the officer complied with the procedure when conducting the search of defendant's vehicle. Specifically, defendant argues that the best evidence rule, Rule 1002 of the Utah Rules of Evidence, requires the State to introduce the actual written policy at the suppression hearing. We disagree. The best evidence rule does not apply because the determination as to the admissibility of the gun was not made at trial, but rather was made at a pretrial suppression hearing, where the rules of evidence do not apply. *See* Utah R.Evid. 1101(b)(1) and Utah R.Evid. 104(a). [FN1]

FN1. A defendant who wishes to make an evidentiary challenge, such as a best evidence objection under Rule 1002, must proceed to trial and make the evidentiary challenge there.

Even if the best evidence rule did apply, the State is not bound to "submit written procedures in order to carry its burden of showing that its agents acted in accordance with standardized procedures when performing an inventory search of an impounded automobile." *State v. Strickling,* 844 P.2d 979, 989 (Utah Ct.App.1992). In *Strickling,* as in the instant case, evidence regarding the procedures for inventory searches came solely from the testimony of the searching officer at a pretrial suppression hearing. *Id.* at 988. The testimony of the officer in the instant case, like the testimony

of the officer in *Strickling,* was sufficient to establish the existence of, and compliance with, standardized procedures. Additionally, defendant's contention that the inventory search was invalid because the officer failed to complete it himself is without merit. The fact that the first officer did not complete the search himself is unimportant because the record reflects that a second officer completed it.

Defendant next argues that the trial court erred in finding the inventory search valid because it was conducted as a pretext to an investigative motive. We again disagree. The law allows an officer to impound a vehicle "with registration that has been expired for more than three months." Utah Code Ann. § 41-1a-1101(1)(f)(i) (1998). The officer in this case testified that he routinely impounds when a vehicle is well past the required time for registration, as defendant's vehicle was in this case. In *Strickling,* the court determined that the State produced the necessary threshold evidence when the impounding officer testified that he impounds sixty to seventy-five percent of the vehicles he stops for expired plate registrations. *See* Strickling, 844 P.2d at 987. The court then stated that "[t]he determinative evidence here is what the officer actually did, without regard to his motives in a particular case, when confronted with registration violations." *Id.* The uncontroverted testimony of the officer in the instant case is that he impounds ninety-nine percent of the vehicles he stops when plate registration expired nine months earlier. Moreover, in addition to the long expired registration, defendant could not provide proof of insurance, further demonstrating that impoundment was proper. Upon properly impounding the vehicle, an inventory search was required.

***2** The long expired registration and the defendant's inability to provide proof of insurance, coupled with the officer's stated impoundment practices, demonstrate that the officer properly conducted the inventory search in accordance with established policy and procedure. Therefore, even assuming the continued viability of the pretext doctrine in inventory search cases, there was no pretext in this case.[FN2]

> FN2. *Compare* State v. Hygh, 711 P.2d at 268 (stating the inventory exception does not apply when the inventory is merely a pretext) *with* State v. Lopez, 873 P.2d 1127, 1138 (Utah 1994) (rejecting the pretext doctrine in traffic stops).

We see no reason to disturb the trial court's determination that the inventory search of defendant's vehicle was valid. Accordingly, we affirm the trial court's refusal to suppress the evidence and defendant's resulting conviction.

GREENWOOD, A.P.J., and DAVIS, J., concur.
Utah App.,1999.
State v. Clifford
Not Reported in P.3d, 1999 WL 33244693 (Utah App.), 1999 UT App 112

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